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Procedure: Evidence

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EVIDENCE

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RELEVANCY

Other Crimes Evidence to Show Knowledge, Intent, System, etc.

As usual, a number of decisions decided during the past term involve the admissibility of other crimes to show knowledge, intent, system, etc.[1] Two of these, *State v. Prieur*[2] and *State v. Moore*,[3] are perhaps the most significant cases decided by the Louisiana supreme court in the criminal evidence field in some time, indicating an increased concern for the protection of the individual from what the new majority finds to be unfair police and prosecutorial practices.[4] Both decisions reflect a turning away from a recent line of cases which had taken what the writers believe to have been an unduly expansive view of the admissibility of other crimes evidence,[5] and a return to an earlier, more orthodox position. The problem is perceptively analyzed in depth in an excellent comment in a previous issue of this *Review*[6] and the subject will therefore not be treated in detail here; a brief discussion will suffice for present purposes.

In *State v. Prieur*,[7] authored by Justice Barham, the court, by a

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1. *See* State v. Crockett, 262 La. 197, 263 So. 2d 6 (1972); State v. Clouatre, 262 La. 651, 264 So. 2d 595 (1972); State v. Hayes, 262 La. 674, 264 So. 2d 603 (1972); State v. Dunn, 263 La. 58, 267 So. 2d 193 (1972); State v. Dudek, 263 La. 258, 268 So. 2d 217 (1972); State v. Williams, 263 La. 755, 269 So. 2d 232 (1972); State v. Woodfox, 263 La. 935, 269 So. 2d 820 (1972); State v. Campbell, 263 La. 1058, 270 So. 2d 506 (1973); State v. McLeod, 271 So. 2d 45 (La. 1973); State v. Shaw, 271 So. 2d 860 (La. 1973); State v. Washington, 272 So. 2d 355 (La. 1973); State v. St. Amand, 274 So. 2d 179 (La. 1973); State v. Edgecombe, 275 So. 2d 740 (La. 1973); State v. Jordan, 276 So. 2d 277 (La. 1973); State v. Prieur, 277 So. 2d 126 (La. 1973); State v. Moore, 278 So. 2d 781 (La. 1973); State v. Richmond, 278 So. 2d 17 (La. 1973); State v. Foy, 278 So. 2d 38 (La. 1973); State v. Frezal, 278 So. 2d 64 (La. 1973).

2. 277 So. 2d 126 (La. 1973).

3. 278 So. 2d 781 (La. 1973).

4. In the opinion of the writers, it is difficult to rationalize *State v. Prieur*, 277 So. 2d 126 (La. 1973), with *State v. St. Amand*, 274 So. 2d 179 (La. 1973), a case authored by Justice Summers and handed down the same day as *Prieur*. Further, the writers have difficulty with the rationale suggested by Justices Tate and Calogero in their concurring opinions in *State v. Frezal*, 278 So. 2d 64 (La. 1973) (a most unusual case), for distinguishing it from *Prieur* and *Moore*.

5. *See The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 349 (1972).

6. Comment, 33 LA. L. REV. 614 (1973).

7. 277 So. 2d 126 (La. 1973).

four to three majority, held that it was reversible error for the trial court, in a prosecution for armed robbery of a bus driver, to introduce evidence of a service station robbery eight days later. It found that evidence of such crimes did not fit within either the knowledge or intent exception to the "other crimes" exclusionary rule provided for in R.S. 15:445 and 446. In this regard the court quoted with approval Professor McCormick's definitions of "knowledge" and "intent,"[8] giving these terms a much narrower interpretation than recent Louisiana decisions afforded them, and stated that "whoever held up the bus driver, Morris Johnson, knew what he was doing and intended what he was doing; there was no question of the robber's acts being 'inadvertent, accidental, unintentional or without guilty knowledge.' "[9] The court added in a significant footnote that the only possible way in which the proffered evidence would be admissible to show knowledge or intent would be in the "utterly unlikely event" that the defendant himself injected such issue, in which case the evidence might "conceivably" be admissible in the state's case in rebuttal. The court further found that the evidence was not admissible to show system,[10] the third exception enumerated in R.S. 15:445 and 446, "[n]or was it properly admissible under any other exception to the 'other crime' exclusionary rule."[11] In addition to the exceptions enumerated in R.S. 15:445 and 446, the court recognized that Louisiana law authorizes admissibility of evidence of related crimes forming part of the res gestae,[12] and of a witness' conviction of a crime offered

8. C. MCCORMICK, EVIDENCE § 190 (Cleary ed. 1972).

9. 277 So. 2d 126, 129 (La. 1973).

10. "We explained in State v. Spencer, 257 La. 672, 243 So. 2d 793 (1971), that crimes of system are those acts and offenses which are of a like nature and exhibit like methods or plans of operation. Spencer was a prosecution for armed robbery, and we held that evidence as to another armed robbery was admissible, for there the other armed robbery followed the same modus operandi as the armed robbery charged and was related in time and location." 277 So. 2d 126, 128 (La. 1973).

11. 277 So. 2d at 129.

12. *See* LA. R.S. 15:447 (1950) and LA. R.S. 15:448 (1950).

An interesting post-*Prieur* case as to crimes constituting part of the res gestae is *State v. Foy*, 278 So. 2d 38 (La. 1973), a murder prosecution. The supreme court found no error in the district attorney's making reference in his opening statement, to defendant's escape from a "work detail" immediately prior to the alleged murder, holding same to have been "part of the res gestae." In the opinion of the writers, the *Foy* case is sound. It is believed that "res gestae" as used in the other crimes context should be interpreted to refer to those crimes which are so wrapped up with the crime charged that whoever committed that crime charged was fully aware of such other crimes as well, and nothing in *State v. Foy* suggests a different approach. (See also in this connection *State v. Richmond*, 278 So. 2d 17 (La. 1973), decided during the past term, which is in accord with the approach taken in *Foy*.) The so-called res gestae exception

for purposes of impeachment.[13] The court did not make clear, however, whether it might recognize other exceptions to the other crimes exclusionary rule. Because of the inadmissibility of the service station robbery, the court found it necessary to reverse the conviction.

Perhaps the most important aspect of the *Prieur* opinion is what the court said concerning the admissibility, on the possible retrial of the instant case, of evidence of another alleged bus robbery also admitted by the trial court. Because of the closeness in time (eighteen days previously), and the fact that in both instances the armed robberies were of a bus driver and occurred at the same corner at the same time of night, the court said that evidence of the other crime might well be admissible at the new trial to show that both crimes were part of a "system" within the meaning of R.S. 15:446. The court indicated, however, that to be admissible as evidence of such a system, the state would have to adduce "clear and convincing evidence"[14] that defendant committed the other crime.

The court found that the spirit of the Louisiana Constitution relative to the rights of the citizen accused of crime requires the establishment of safeguards prerequisite to the admissibility of other crimes evidence under R.S. 15:445 and 446. In keeping with this conclusion, the court, citing two Minnesota cases[15] which had established similar safeguards in that state, outlined five safeguards which it said would be applicable on the retrial of the instant case and to all cases tried after the instant decision became final. Because of their importance, these safeguards are set forth in the margin.[16] Phrased

to the hearsay rule has at times been given a very broad interpretation indeed, and it is believed that the cases decided in that context are not necessarily controlling where the question is whether certain other crimes form part of the res gestae.

13. LA. R.S. 15:495 (1950), *as amended by* La. Acts 1952, No. 180 § 1.

14. 277 So. 2d 126, 129 (La. 1973). *See also* MCCORMICK, EVIDENCE § 190 (Cleary ed. 1972).

15. State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) and State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965).

16. "(1) The State shall within a reasonable time before trial furnish in writing to the defendant a statement of the acts or offenses it intends to offer, describing same with the general particularity required of an indictment or information. No such notice is required as to evidence of offenses which are a part of the res gestae, or convictions used to impeach defendant's testimony.

"(2) In the written statement the State shall specify the exception to the general exclusionary rule upon which it relies for the admissibility of the evidence of other acts or offenses.

"(3) Prerequisite to the admissibility of the evidence is a showing by the State that the evidence of other crimes is not merely repetitive and cumulative, is not a subterfuge for depicting the defendant's bad character or his propensity for bad behavior, and that it serves the actual purpose for which it is offered.

in broad general terms, they necessarily leave a number of unanswered questions to be elucidated in the future on a case-by-case basis. Continued uncertainty in the law there must be, but the court by setting forth these guidelines is attempting to state in advance generally what it will require of the prosecution in this sensitive area and thereby to reduce reversals as to the admissibility of other crimes evidence.

The other landmark decision as to the admissibility of other crimes evidence was the four to three decision in *State v. Moore*[17] authored by Justice Dixon, handed down about three months after *State v. Prieur* and signed by the same four justices who comprised the majority in *Prieur*. *State v. Moore*, a rape prosecution, concerned the admissibility of evidence tending to indicate that the defendant had raped another girl four or five blocks away four days before. There were, however, dissimilar circumstances, and the majority found that the other alleged rape did not fit into any exception provided by R.S. 15:445 and 446. Following a scholarly analysis of English law in the area, the court in a very important passage stated:

> However, in spite of the prejudicial nature of evidence of other offenses, criminal cases cannot be tried in an antiseptic vacuum. Matters which are logically relevant to issues before the jury should not be excluded merely because they show the accused has committed other offenses. Nevertheless, even if relevant, because the evidence of other offenses is so strongly prejudicial 'the greatest care ought to be taken to reject such evidence, unless it is plainly necessary to prove something which is really in issue.' R. v. Bond (1906) 2 K.B. 389, 417.[18]

Finding that the claimed prior rape was not relevant to the alleged instant rape, the court found it unnecessary to determine whether the admission of evidence with respect to it would be unduly prejudicial.

A very significant aspect of the *Moore* decision is its emphasis that the state cannot always rely upon a defendant's "not guilty" plea as justification for the admissibility of other crimes evidence to show

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"(4) When the evidence is admitted before the jury, the court, if requested by defense counsel, shall charge the jury as to the limited purpose for which the evidence is received and is to be considered.

"(5) Moreover, the final charge to the jury shall contain a charge of the limited purpose for which the evidence was received, and the court shall at this time advise the jury that the defendant cannot be convicted for any charge other than the one named in the indictment or one responsive thereto." 277 So. 2d 126, 130 (La. 1973).

17. 278 So. 2d 781 (La. 1973).

18. *Id.* at 787. (Footnote omitted.)

knowledge and intent.[19] Whether or not such may be done in a particular case, suggests the court, depends upon the reality of the circumstances.[20]

Character of the Accused—Cross-examination of Character Witness

Where a defendant has placed his character at issue by calling a character witness, it is generally held that, to test the character witness' knowledge of defendant's reputation and standard of evaluation, the prosecution, on cross-examination of the character witness, may properly ask whether he has ever *heard* of prior arrests or acts of misconduct of the defendant.[21] To prevent the cross-examination from wafting "unwarranted innuendo,"[22] the better view is that the defendant is entitled to certain safeguards against improper use of such questions.[23] In light of the relevancy of this line of questioning, and the fact that in this context character may not be properly proved or disproved by specific instances, the writers believe that the character witness should not be permitted to give positive or affirmative testimony as to the fact of the particular arrests or acts inquired about—only whether he had *heard* of same.[24] Without discussing this distinction, the court in *State v. Daniels*,[25] an attempted rape case, relying on prior Louisiana cases, upheld the trial court's overruling of defendant's objection to the prosecution's questioning as to whether a character witness called by the defendant was "aware" of

19. "In explaining whether the evidence of other crimes might be relevant, the 'matter in issue' must be real and genuine, and not one which the prosecution conceives to be at issue merely because of the plea of not guilty. Archbold, 34th Ed., § 1016. 'The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of evidence.' R. v. Thompson (1918) A.C. 221, 232." 278 So. 2d 781, 785 (La. 1973).

20. A similar approach is to be seen in *State v. Prieur*, 277 So. 2d 126 (La. 1973), and also in *State v. Jordan*, 276 So. 2d 277 (La. 1973), another important case decided during the past term. *State v. Bell*, 279 So. 2d 164 (La. 1973) indicates the importance the court places upon the prejudicial effect of reference to evidence of other crimes, and demonstrates that the prosecution should proceed with care in mentioning other crimes in its opening statement, or inquiring into same for purposes of impeachment of a non-defendant witness.

21. *See* Michelson v. United States, 335 U.S. 469 (1948); McCORMICK, EVIDENCE § 191 (Cleary ed. 1972).

22. *See* Michelson v. United States, 335 U.S. 469, 481 (1948).

23. *See* Michelson v. United States, 335 U.S. 469 (1948); Miller v. State, 418 P. 2d 220 (Okla. 1966); McCORMICK, EVIDENCE § 191 (Cleary ed. 1972).

24. *See* Michelson v. United States, 335 U.S. 469 (1948); *but see* McCORMICK, EVIDENCE § 191 (Cleary ed. 1972).

25. 262 La. 475, 263 So. 2d 859 (1972).

prior arrests of the defendant for attempted rape and driving while intoxicated. Such a question, it is believed, violated the distinction noted above. The distinction, it is submitted, is important and should be recognized in Louisiana. Further, it is hoped that safeguards similar to those adopted in other jurisdictions and by the Louisiana supreme court in *State v. Prieur*[26] relative to the admissibility of other crimes evidence[27] to show knowledge, intent, system, etc. will also be adopted in Louisiana in this area.

Lie Detector Test

In a scholarly opinion authored by Justice Tate in *State v. Refuge*,[28] the court followed the general American position that, absent stipulation, the results of lie detector tests are inadmissible, as is testimony as to whether or not a witness was willing to take such a test.[29] The court held, however, that although "extremely close," under the facts of the instant case the error was not so prejudicial as to necessitate reversal.

COMPETENCY

In a well-reasoned opinion by Justice Dixon in *State v. Glover*,[30] a unanimous court held that, under the circumstances of the case, the trial court committed reversible error in finding a 12-year-old child incompetent to testify. The court noted that no Louisiana case had been discovered holding a 12-year-old child incompetent, and found that there was insufficient evidence in the record in the instant case to support the trial judge's conclusion that the witness was not a person of proper understanding, the test laid down by R.S. 15:469.

EXAMINATION AND CROSS-EXAMINATION

Cross-examination and the Right of Confrontation

State v. Soukup[31] affords a fascinating illustration of the possible interaction between defendant's right of confrontation and a state's

26. 277 So. 2d 126 (La. 1973).

27. *See* discussion under "Other Crimes Evidence to Show Knowledge, Intent, System, etc.," *supra*.

28. 264 La. 135, 270 So. 2d 842 (La. 1972).

29. As to the propriety of such a question, see *State v. Stahl*, 236 La. 362, 107 So. 2d 670 (1958), *noted in* 19 LA. L. REV. 881 (1959); *The Work of the Louisiana Supreme Court for the 1958-1959 Term—Evidence*, 20 LA. L. REV. 335, 344 (1960).

30. 262 La. 495, 263 So. 2d 866 (1972).

31. 275 So. 2d 179 (La. 1973).

witness' privilege against self-incrimination. A crucial state's witness, who himself was under suspicion in a possession of marijuana case, was permitted by the trial court to assert the fifth amendment as to some matters (those deemed by the court not to be self-incriminatory), but ordered to testify as to others. Defendant's inability effectively to cross-examine the state's witness under the circumstances necessitated reversal, concluded a divided court, because of what it found to be a denial of defendant's right of confrontation. The court in effect held that the state could not avail itself of the testimony of a witness where, because of the witness' assertion of the privilege against self-incrimination, defendant could not effectively cross-examine him. Today's answer to such a quandary on the part of the prosecution would presumably be for the state either not to call the witness, or under the authority of Louisiana's recently adopted compelled testimony statute[32] to require him to testify fully and thus to deny itself future use of such testimony.

Court's Witness

In *State v. Mims*[33] the trial court refused defendant's request to call a witness as its own in order that both defendant and the prosecution could cross-examine him. In a per curiam decision, the supreme court upheld the action of the trial court, stating:

> The contention of defendant on this point is without merit, inasmuch as there is no procedural rule in Louisiana requiring the Court to call a witness so that both sides may cross-examine him.[34]

Although there is no statutory authority in Louisiana requiring such action by the trial court, it would seem that under certain circumstances it would be quite appropriate for the trial court to comply with such a request[35] and that in some instances the failure of the trial court to grant such a request should be held reversible error. That undue restrictions on a defendant's questioning of a witness called by him, coupled with inability to bring to the jury's attention helpful, trustworthy out-of-court statements by such witness, under certain circumstances may constitute a denial of due process of law, is the

32. LA. CODE CRIM. P. art. 439.1; *see* Zicarelli v. New Jersey State Comm'n of Inves., 406 U.S. 472 (1972); Kastigar v. United States, 406 U.S. 441 (1972).

33. 263 La. 193, 267 So. 2d 570 (1972).

34. *Id.* at 195, 267 So. 2d at 571 (1972).

35. Young v. United States, 107 F.2d 490 (5th Cir. 1939); MCCORMICK, EVIDENCE § 8 (Cleary ed. 1972).

subject of a very important recent holding by the United States Supreme Court.[36]

Refreshing Recollection—Right of Cross-examiner to Inspect Memorandum

R.S. 15:279 is in accord with the general American view that a witness' use of a document to refresh his memory is not dependant on its having been made by him contemporaneously with the event described therein. In *State v. Holloway*,[37] three members of the court, in persuasive scholarly opinions (one concurring and two dissenting),[38] took the position that Louisiana should also follow the safeguards generally followed elsewhere as to the use of such memoranda: (1) that to avoid abuse same is subject to the control of the court, including the authority of the trial court in its discretion to forbid the use of the memorandum if it finds that its value as an aid to memory is outweighed by "the danger of undue suggestion,"[39] and (2) that the opposing side has the right to inspect the memorandum which the witness seeks to use and to have same available in cross-examining the witness. The majority per curiam decision apparently deemed it unnecessary to pass upon these points.[40]

Other cases decided during the past term dealing with the right to inspect a witness' prior memorandum are discussed along with the materials dealing with criminal discovery.[41]

ATTACKING CREDIBILITY

Prior Inconsistent Statements

Use of Uncautioned Statements for Impeachment Purposes

In a per curiam decision in *State v. Williams*,[42] the court found that there was sufficient evidence in the record to support the trial

36. Chambers v. Mississippi, 93 S. Ct. 1038 (1973).

37. 274 So. 2d 699 (La. 1973).

38. Justice Calogero concurring, and Justices Barham and Tate dissenting.

39. MCCORMICK, EVIDENCE § 9 (Cleary ed. 1972).

40. See in this connection Justice Calogero's concurring opinion. The case of *State v. Tharp*, 284 So. 2d 536 (La. 1973), decided during the 1973-74 term clearly indicates an acceptance of the above noted safeguards urged by Professor McCormick, and states: "Insofar as State v. Holloway, 274 So. 2d 699 (1973), State v. Nails, 255 La. 1070, 234 So. 2d 184 (1970) and State v. Franklin, 263 La. 334, 268 So. 2d 249 (1972) are in conflict with this opinion they are overruled."

41. *See also* the discussion in "Right to Inspect a Witness' Prior Memorandum" under "Discovery, Production, and Inspection of Evidence in Criminal Cases," *infra*.

42. 271 So. 2d 857 (La. 1973).

court's finding that a challenged statement taken by the authorities from the defendant had been preceded by the caution prescribed by *Miranda v. Arizona*,[43] and that the statement had been voluntarily given. Over protest by Justice Barham, the court, without discussion, went on to state that in view of the United States Supreme Court decision in *Harris v. New York*[44] defendant's statement would be admissible for impeachment purposes, even absent the *Miranda* warnings. Justice Barham in his concurring opinion properly points out that *Harris v. New York* merely *permits* a state to use such a statement for impeachment purposes, and of course does not *compel* it to do so. The *Harris* decision is a controversial one, and for the court to adopt it without discussion, in unnecessary language in a per curiam decision, seems unfortunate.

Collateral Matter

Extrinsic evidence is inadmissible to impeach a witness by showing that, outside of court, he had made an inconsistent statement about some collateral matter.[45] A different rule would result in time-consuming inquiry into side issues. That such inquiry might be not only time-consuming, but extremely prejudicial, is demonstrated by *State v. Kaufman*[46] where, on rehearing, in a five to two decision, the court reversed a murder conviction on the ground that the state had attempted to impeach its own witness as to a prior inconsistent statement relative to a collateral, and extemely prejudicial, racial matter.[47]

Past Convictions

In keeping with the broad authorization of R.S. 15:495, the supreme court in *State v. Rossi*[48] held that a witness may be impeached by convictions which are quite remote in time (in the *Rossi* case presumably more than twenty-five years), and regardless of the fact that the earlier crime has no particularized relevance to truth or

43. 384 U.S. 436 (1966).

44. 401 U.S. 222 (1971).

45. *See* LA. R.S. 15:494 (1950).

46. 278 So. 2d 86 (La. 1973).

47. See also *State v. St. Amand*, 274 So. 2d 179 (La. 1973), an armed robbery case, where in light of the particular circumstances presented, a divided court held admissible an out-of-court statement by the defendant admitting drug use, as contradictory to testimony given by him on the stand. The writers agree with Justice Tate's dissenting opinion that the testimony was as to a collateral matter and thus under R.S. 15:494 is inadmissible to impeach.

48. 273 So. 2d 265 (La. 1973).

veracity. Similarly, said *State v. Odom*,[49] a witness may be impeached by a misdemeanor conviction as well as a felony. In the opinion of the writers R.S. 15:495 is unduly broad.[50] Reflecting concern about unfettered use of prior convictions to impeach, Justice Barham, in a concurring opinion in *State v. Odom*, stated:

> In the proper case we should exclude the introduction of other convictions for the purpose of impeachment and as an attack upon credibility unless the convictions are of offenses which, by their very nature, charge perjury, falsification, or lack of truthfulness.[51]

Conditional Discharge

Under the authority of R.S. 40:983 a trial judge may defer sentence and place a first offender convicted of certain drug offenses on probation, on condition that if he complies with the terms of his probation, he will be discharged and his conviction expunged. *State v. Rabbas*[52] makes it clear that a witness who has been placed on probation under the authority of this provision and has not violated the terms of his probation may not properly be impeached by such "convictions."

Right to Counsel

State v. Kelly[53] held that it was not necessary for the state in its cross-examination of a defendant relative to a prior conviction for purposes of impeachment to lay a predicate showing that he was represented by counsel at the earlier trial. The court took the position that *Loper v. Beto*[54] was inapplicable.

The record in the *Kelly* case reveals that, although defendant objected to questioning as to prior convictions and took a bill of exceptions relative to same, defense counsel made no claim in the trial court that in the prior proceedings culminating in conviction, defendant had been denied his constitutional right to counsel. Argument to this end was made for the first time on appeal. Likewise at the trial of Loper (which took place before *Gideon v. Wainwright*),[55]

49. 273 So. 2d 261 (La. 1973). *See also* State v. Green, 273 So. 2d 288 (La. 1973) (like effect).

50. *See* McCORMICK, EVIDENCE § 43 (Cleary ed. 1972).

51. 273 So. 2d 261, 265 (La. 1973).

52. 278 So. 2d 45 (La. 1973). Consider also the effect of the provisions of LA. CODE CRIM. P. art. 894.

53. 271 So. 2d 870 (La. 1973).

54. 405 U.S. 473 (1972). *See also* Burgett v. Texas, 389 U.S. 109 (1967).

55. 372 U.S. 335 (1963).

defense counsel had failed to argue that the convictions inquired into for the purpose of impeachment had been obtained in consequences of proceedings at which defendant had been denied his right to counsel. A critically important distinction, however, between *Loper v. Beto* and *State v. Kelly* is that *Loper* was a habeas corpus proceeding rather than an appeal.[56]

It would seem clear from *Loper v. Beto* that absent effective waiver, the prosecution may not properly ask a defendant about a prior conviction where such conviction was obtained in consequence of a proceeding in which defendant was denied his constitutional right to counsel. Further, as seen in *Loper*, contemporaneous objection to such a line of impeachment is not a prerequisite for consideration on habeas corpus. *Loper v. Beto* does not however go so far as to require the prosecution affirmatively to show that a prior conviction inquired into for purpose of impeachment was constitutionally obtained as a prerequisite to questioning defendant relative to same. But if such conviction was in fact obtained unconstitutionally, defendant may, under *Loper*, thereafter be able to secure a new trial via a habeas corpus proceeding, unless he somehow has waived his right.[57] The prosecutor should therefore proceed with great care in attempting impeachment via the showing of prior convictions, for he may thereafter be called upon to litigate the prior conviction's constitutionality in a collateral proceeding attacking the instant conviction. Further, it is believed that if defendant and his counsel are fully to protect themselves against the possibility of waiver, and are aware at the trial of the unconstitutionality of the prior conviction, they should raise the invalidity of the prior conviction at the trial level and thereafter pursue the matter on appeal, rather than rely upon some subsequent collateral attack.

Cross-examination as to Prior Criminal Acts, Absent Conviction

Two decisions involving Raymond Prieur were decided during the past term and both are very important. The first has already been discussed.[58] The second *State v. Prieur*[59] firmly establishes that a defendant witness may not, on cross-examination, be asked about

56. *See* Kaufman v. United States, 394 U.S. 217 (1969); Henry v. Mississippi, 379 U.S. 443 (1965); Faye v. Noia, 372 U.S. 391 (1963); State v. Barrabina, ___ So. 2d ___ (La. 1973) (especially Justice Tate's concurring opinion); Comment, 26 LA. L. REV. 705 (1966).

57. *Id.*

58. *State v. Prieur*, 277 So. 2d 126 (La. 1973), is discussed under "Relevancy," *supra*.

59. 277 So. 2d 134 (La. 1973).

past crimes for which there has been no conviction, where the relevance of such crime is for impeachment purposes only. *State v. Perkins*[60] had earlier strongly indicated this to be the Louisiana rule, but was not altogether clear, and it is very helpful to have the matter further clarified. The problems involved are extensively explored in an excellent comment published earlier in this Review.[61]

Impeaching Own Witness

Louisiana R.S. 15:487 provides:

> No one can impeach his own witness, unless he have been taken by surprise by the testimony of such witness, or unless the witness show hostility toward him, and, even then, the impeachment must be limited to evidence of prior contradictory statements.[62]

Since such a prior inconsistent statement is admissible merely to neutralize the testimony given by the witness on the stand, and not to prove its substantive content,[63] it seems quite illogical to permit a party thus to impeach his own witness if he knows in advance that the witness will testify adversely to his cause.[64] To do so makes it possible for a party to call a witness in order to "get in" an out-of-court statement with the hope that the jury might give it the forbidden effect. Despite the logic of this position, the court in 1936 in *State v. Williams*[65] applied R.S. 15:487 literally, holding that a party could impeach his own witness if the witness were hostile, even though the party was not "surprised" by the witness' testimony.

In *State v. Rossi*,[66] Justice Tate, in a concurring opinion to a decision authored by himself, reconsidered the problem and emphatically indicated that when and if the question is squarely presented, the *Williams* decision, and sporadic cases following it, should be reex-

60. 248 La. 293, 178 So. 2d 255 (1965).

61. Comment, 33 LA. L. REV. 630 (1973).

62. For a case decided during the past term illustrating the principle that the state cannot properly impeach its own witness except under certain circumstances, see Justice Tate's decision on rehearing in *State v. Kaufman*, 278 So. 2d 86 (La. 1973) (especially footnote 2, page 96, and accompanying text).

63. *See* State v. Ray, 259 La. 105, 249 So. 2d 540 (1971), *discussed in The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 311 (1973).

64. See Justice Tate's persuasive dissenting opinion in *State v. Finley*, 275 So. 2d 762 (La. 1973). *See also The Work of the Louisiana Supreme Court for the 1960-1961 Term—Evidence*, 22 LA. L. REV. 397 (1962).

65. 185 La. 849, 171 So. 52 (1936).

66. 273 So. 2d 265 (La. 1973).

amined by the court. The implication is clear that Justice Tate, at least, believes that the *Williams* rule should be reversed. Further, he suggested that the standard for showing that a party's witness is "hostile" "should be much more carefully examined and strictly limited to situations where some intrinsic bias in favor of the defendant and antagonistic to the state's case must first be shown, such as a devoted wife called as a witness against her husband. The state's simple declaration that the witness is 'hostile' since unwilling to testify as the state wishes should not suffice."[67]

PRIVILEGED COMMUNICATIONS

Attorney-Client

In a well-documented opinion in *Eagle Industrial Associates, Inc. v. Universal Oil Corporation*[68] authored by Judge Bolin, the Second Circuit Court of Appeal, relying in part on *State v. Childers*,[69] held that where an attorney-client communication is made for the purpose of committing a fraud, the privilege itself is vitiated, and the attorney may be obliged to testify. The decision appears eminently sound.

HEARSAY

Assertive Acts as Hearsay

Under the traditional view, assertive non-verbal conduct, not under oath or subject to cross-examination at the time performed, offered in court to prove the truth of such assertion, is just as much hearsay as a verbal assertion of like character.[70] Thus it is submitted that the court was in error in *State v. St. Amand*[71] when it stated that out-of-court action, assertive in character, by someone other than the witness, identifying the defendant, was non-hearsay, because it was "physical activity performed in [the witness'] presence and viewed by him."[72]

Complaint to Police

In *State v. McLeod*[73] the court, via a per curiam opinion, upheld

67. *Id.* at 271.

68. 277 So. 2d 720 (La. App. 2d Cir. 1973).

69. 196 La. 554, 199 So. 640 (1940).

70. C. MCCORMICK, EVIDENCE § 250 (Cleary ed. 1972); UNIFORM RULE OF EVIDENCE 62(1); Comment, 14 LA. L. REV. 611 (1954).

71. 274 So. 2d 179 (La. 1973).

72. *Id.* at 190.

73. 271 So. 2d 45 (La. 1973).

the admission of testimony of an out-of-court complaint to the arresting officer by a non-witness as to crimes other than the one for which the defendant was being charged. The court made a broad, blanket statement that:

> it is well settled that an officer can testify that a complaint was made, and what action he took as a result of that complaint. State v. Favre, 255 La. 690, 232 So. 2d 479 (1970).[74]

Under certain circumstances the complaint to the arresting officer may have independent relevance apart from the truthfulness of its content and thus be admissible as non-hearsay,[75] or fit some recognized exception to the hearsay rule. It is submitted, however, that the content of a complaint received by a police officer is not necessarily admissible over a hearsay objection.[76] Admissibility here, as elsewhere, should, it is submitted, depend upon the relevance of the complaint and the use to which the evidence is to be put. In the instant case the complaint, it is believed, should have been held inadmissible, for it was an out-of-court charge as to very serious other crimes, and the fact of the charge apart from its truth seems to have had very little relevance. Perhaps the fact of the other crimes could have been properly proved, but not by an unsworn statement by a non-witness. Any probative value as to the content of the complaint was out-weighed, it is believed, by its prejudicial impact.[77]

Family History—Newspaper Article

State ex rel. Plaia v. Louisiana State Board of Health[78] was a mandamus action brought by the mother of a child to compel the defendant to issue a birth certificate for the child showing her to be of the "white" race. The Fourth Circuit Court of Appeal held that the trial court erred in excluding a 1970 newspaper account discussing the history of the child's maternal family and its purported descent from

74. *Id.* at 48. See also in this connection *State v. Preece*, 264 La. 156, 270 So. 2d 850 (1972). For a subsequent history of the *Favre* case in federal court, see *Favre v. Henderson*, 464 F.2d 359 (5th Cir.), *cert. denied*, 409 U.S. 942 (1972); *United States ex rel. Favre v. Henderson*, 444 F.2d 127 (5th Cir. 1971); *Favre v. Henderson*, 318 F. Supp. 1384 (E.D. La. 1970).

75. *See* Comment, 14 LA. L. REV. 611 (1954).

76. *See* State v. Favre, *discussed in The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 381, 386 (1971). *See also* Favre v. Henderson, 464 F. 2d 359 (5th Cir.), *cert. denied*, 409 U.S. 942 (1972); United States *ex rel.* Favre v. Henderson, 444 F.2d 127 (5th Cir. 1971); Favre v. Henderson, 318 F. Supp. 1384 (E.D. La. 1970).

77. *See* State v. Moore, 278 So. 2d 781 (La. 1973).

78. 275 So. 2d 201 (La. App. 4th Cir. 1973).

a freed African slave. The court said, however, that although admissible, the newspaper article was entitled to "little weight," and ultimately decided in favor of petitioner on the merits.

Although the writers generally favor the current trend toward relaxation of the hearsay rule, especially in Louisiana civil cases tried before a judge alone, it is believed that this newspaper article, recent in origin, discussing remote geneological traditions should not have been held admissible to prove the facts contained therein. This newspaper account is to be clearly distinguished from that admitted in *Dallas County v. Commercial Union Assur. Co.*,[79] a well-known decision authored by Judge Wisdom. The *Dallas County* case concerned a very reliable old contemporary account in a local newspaper of a fact that was at the time published the subject of firsthand knowledge of many of the readers.[80] Although proof of family history is an appropriate subject of a well-recognized hearsay exception, the ambit of the exception, it is believed, should not be extended to include recent newspaper accounts. The writer of the newspaper story, if available, might perhaps have been properly permitted to testify over hearsay objection but the propriety of admitting the newspaper article seems very questionable.

DISCOVERY, PRODUCTION, AND INSPECTION OF EVIDENCE IN CRIMINAL CASES

Louisiana, it is submitted, is in desperate need of a meaningful discovery system for criminal cases.[81] The supreme court took a significant and forward-looking step in that direction in *State v. Migliore*,[82] holding that under appropriate circumstances a defendant accused of illegal possession of marijuana is entitled to have his expert in advance of trial examine the substance alleged to be such.

79. 286 F.2d 388 (5th Cir. 1961).

80. *Succession of Marcour*, 180 La. 129, 156 So. 198 (1934), was cited in *Plaia* as authority for the admissibility of the newspaper account. *Marcour*, however, concerned the admissibility of an old contemporary death notice published in the newspaper which, *inter alia*, stated the age of the decedent at the time of his death, which was received in evidence by the trial court as evidence of his age at death. It is submitted, therefore, that *Marcour* is not necessarily controlling as to the question presented in *Plaia*. The circumstances relative to the newspaper article in the *Marcour* case were much more like those of the *Dallas County* case than the facts in the instant case.

81. *See The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 321 (1973).

82. 261 La. 722, 260 So. 2d 682 (1972). *See The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 321 (1973); *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Criminal Procedure I*, 33 LA. L. REV. 295, 298 (1973).

This significant decision was seemingly limited[83] to its facts[84] by *State v. Jones*.[85] However, the action of the court in its brief per curiam decision in the more recent case of *State v. Flood*,[86] when taken together with the concurring and dissenting opinions therein, suggests that the court may now be more inclined than indicated by *State v. Jones* to take a broader view relative to defendant's inspection in advance of trial of physical evidence in the hands of the procescution.[87]

Right to Inspect a Witness's Prior Memorandum

Where a police officer has testified for the state, is defense counsel entitled to inspect prior reports, notes, or records made by the witness, in order to use same in cross-examining the witness, and possibly as impeachment evidence if it develops that the prior records contain statements contradictory to those given by the witness on the stand?[88] In *State v. Franklin*[89] the court, adhering to prior jurisprudence, continued to reject the position taken by the United States Supreme Court in the *Jencks*[90] case, holding that no such right exists absent a showing that the out-of-court statement is contradictory to that given by the witness on the stand.[91] In the opinion of the writers, the position taken in the *Franklin* case does not afford the defendant sufficient protection.[92] Unless defense counsel is permitted to inspect

83. See the dissenting opinion of Justice Barham in *State v. Jones*, 263 La. 164, 182, 267 So. 2d 559, 566 (1972).

84. *Id.* at 176, 267 So. 2d at 564: "possession of a substance which is criminal merely by virtue of its chemical composition."

85. 263 La. 164, 267 So. 2d 559 (1972).

86. 273 So. 2d 294 (La. 1973).

87. For more intensive discussion of last term's decisions dealing with the broader problem of discovery and the duty of the prosecution to disclose, see *Criminal Procedure*, page 423 *supra*.

88. The right of opposing counsel to inspect a statement used by a witness on the stand to refresh his memory is discussed under "Examination and Cross-Examination—Refreshing Recollection," *supra*.

89. 263 La. 344, 268 So. 2d 249 (1972).

90. Jencks v. United States, 353 U.S. 657 (1957). *See also* Note, 18 LA. L. REV. 345 (1958); Note, 18 LA. L. REV. 350 (1958).

91. To similar effect, see *State v. Curry*, 262 La. 616, 264 So. 2d 583 (1972), concerning a prior written statement given to police by a person other than a police officer (who thereafter is called to the stand by the prosecution), and *State v. Cryer*, 262 La. 575, 263 So. 2d 895 (1972), concerning prior written reports made by a United States special narcotics agent testifying for the state. See also *State v. Brumfield*, 263 La. 147, 267 So. 2d 553 (1972), concerning refusal to permit defendant to see police reports purportedly used by police officers to refresh memory prior to taking the stand.

92. *See The Work of the Louisiana Supreme Court for the 1956-1957*

the witness' prior statement, it may be impossible for him to show the inconsistency, the prerequisite to seeing the out-of-court statment.[93]

Confessions and Inculpatory Statements—Advance Written Notice and Non-reference in Opening Statement

The state's opening statement is a device, albeit inadequate, traditionally performing part of the task of giving the defendant notice as to what the state expects to prove.[94] Recognizing, however, the prejudicial effect to a defendant of the state's adverting in its opening statement to a confession or inculpatory statement which thereafter is found to be inadmissible, the 1966 Code of Criminal Procedure prohibited mention of a confession or inculpatory statement in the opening statement,[95] and required instead that the defendant be given advance written notice of same.[96] In *State v. Clouatre*[97] the

Term—Evidence, 18 LA. L. REV. 139, 143 (1957).

93. In *State v. Tharp*, 284 So. 2d 536 (La. 1973), decided during the 1973-74 term, a police officer testifying for the state, asked on cross-examination by the defendant how he was able to be so precise as to certain critical data testified to, replied, "That's what I have in my report, and I write my report up when I pick up evidence," and thereafter stated that he had a copy of his report with him on the stand. A divided court held that defense counsel was entitled to see the report. The majority found that the facts did not present a situation where a police officer "was testifying from memory refreshed outside the courtroom prior to taking the stand." The court stated: "We hold that the trial court erred in refusing to allow defendant to examine the report. Defendant had the right to establish the nature of the testimony given from a prior record to determine the accuracy and truthfulness of that testimony, or of the record itself. The trial court is obligated to monitor and control the testimony from a prior record. That court must determine if memory is actually refreshed as required by R.S. 15:279, which is the overwhelming view of the common law jurisdictions which we should follow in criminal prosecutions absent contrary statutory provisions. Here no such determination was made. The court disallowed the second safeguard when it refused to permit defendant to examine the report or memorandum, and to cross-examine the witness for the purpose of determining the credibility of the testimony or the record.

"Insofar as State v. Holloway, 274 So. 2d 699 (1973), State v. Nails, 255 La. 1070, 234 So. 2d 184 (1970) and State v. Franklin, 263 La. 334, 268 So. 2d 249 (1972) are in conflict with this opinion they are overruled."

See also the discussion under "Refreshing Recollection—Right of Cross-examiner to Inspect Memorandum," *supra.*

94. For discussion of the use of the opening statement, see official comments to Code of Criminal Procedure article 769.

95. LA. CODE CRIM. P. art 767.

96. *Id.* art. 768.

97. 262 La. 651, 264 So. 2d 595 (1972). *See also* three other cases decided during the past term: State v. Richmond, 278 So. 2d 17 (La. 1973); State v. Curry, 263 La. 997, 270 So. 2d 484 (1972); State v. Johnson, 263 La. 462, 268 So. 2d 620 (1972).

court held that the advance written notice requirement does not apply to statements forming part of the res gestae. Further, in *State v. Johnson*,[98] following the court's earlier decision in the *Fink*[99] case, the court held that the advance written notice is not required for statements allegedly made by the defendant prior to the criminal act charged.[100]

As an extension of the above approach *State v. Curry*[101] held that despite the prohibition in article 767 of the Code of Criminal Procedure against the state's "in any way" adverting in its opening statement to a confession or inculpatory statement made by the defendant, the state could properly so advert to a statement by the defendant to a companion when they were allegedly covering up the murder victim that, "I don't have to kill you. You're in this with me."[102] Finding the statement to be part of the res gestae, the court concluded that the prohibition of article 767 did not apply.[103] Further, in *Curry*, for the same reason, the court held that the prosecution had not erred when it replied in the negative to defendant's pre-trial motion for a bill of particulars and motion to suppress relative to the state's possible possession of an inculpatory statement made by the defendant.

In the opinion of the writers, whether or not an incriminating statement made by the defendant is part of the res gestae, it nonetheless should be deemed an inculpatory statement within the meaning of articles 767 and 768. Whether such statement forms part of the res gestae, or was made before or after the alleged crime, it is submitted that a defendant should at least be entitled to the advance notice

98. 263 La. 462, 268 So. 2d 620 (1972). *See* State v. Curry, 263 La. 997, 270 So. 2d 484 (1972) (to like effect).

99. State v. Fink, 255 La. 385, 231 So. 2d 360 (1970). *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Criminal Procedure*, 31 LA. L. REV. 370, 374 (1971).

100. For another case decided during the past term taking a somewhat relaxed attitude towards the requirement of article 768 as to advance written notice to a defendant of the state's intention to use a confession or inculpatory statement, see *State v. Coates*, 273 So. 2d 282 (La. 1973). Relying in part on *State v. Lacoste*, 256 La. 697, 237 So. 2d 871 (1970), and the harmless error provision of Code of Criminal Procedure article 921, the court found no reversible error in the trial court's denying a defendant's request for a continuance where the defendant had been provided with a copy of the written confession, but had not been given the required written notice of intent to utilize same, and defendant failed to make any showing that he was either surprised or prejudiced by the state's technical non-compliance with the provisions of article 768.

101. 263 La. 997, 270 So. 2d 484 (1972).

102. *Id.* at 1003, 270 So. 2d at 486.

103. To similar effect, see *State v. Crockett*, 262 La. 197, 263 So. 2d 6 (1972).

provided for by article 768 and the prohibition in article 767 against the same's being mentioned in the state's opening statement.

Exculpatory Statements

In *State v. Jones*,[104] also decided during the past term, the court held that despite the provisions of article 767 the district attorney may properly advert in his opening statement to a post-crime "exculpatory statement" later to be offered by the state. The statement in question must have contained inculpatory implications or otherwise presumably it would not have been offered by the state. Its relevancy when offered by the prosecution apparently resulted from its inculpatory impact, and it is believed that the protection afforded by articles 767 and 768 should apply to such statement.

Advance Written Notice in Non-jury Trial

Further limiting the salutary safeguards of article 768, the court in *State v. Cleary*,[105] relying on *State v. Himel*,[106] held that no advance written notice is required when the case is to be tried by the judge alone without a jury. Justice Summers authored a very persuasive and eloquent dissenting opinion concluding:

> State v. Himel, 260 La. 949, 257 So. 2d 670 (1972), upon which this decision rests was rendered by a divided court and should be reconsidered. The decision has the effect, in nonjury trials, of doing away with both the opening statement and the early advice in writing that a confession or inculpatory statement will be used. The effect is to permit the State to surprise the defendant in a nonjury trial but not in a jury trial.[107]

104. 263 La. 164, 267 So. 2d 559 (1972).

105. 262 La. 539, 263 So. 2d 882 (1972).

106. 260 La. 949, 257 So. 2d 670 (1972). *See The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 319 (1973); *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Criminal Procedure II*, 33 LA. L. REV. 300, 303 (1973).

107. 262 La. 539, 543, 263 So. 2d 882, 883-84 (1972).